

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEVIN ELLIS

Claimant

VS.

KENCO TRUCKING CO.

Respondent

AND

EMPLOYERS MUTUAL CASUALTY CO.

Insurance Carrier

Docket No. **1,030,052**

ORDER

Claimant requests review of the May 10, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The claimant alleged back injuries at work on July 15, 2006, and again November 30, 2006. He was provided some chiropractic treatment after the first alleged incident and continued working. It was controverted whether the worsening of his back condition in December 2006 was caused by the alleged November 30, 2006 accident or an injury to claimant's back while helping move furniture in December.

The Administrative Law Judge (ALJ) found claimant's testimony suspect and determined he did not sustain his burden of proof that he suffered accidental injury arising out of and in the course of employment.

The claimant requests review of whether the ALJ erred in finding claimant did not sustain his burden of proof.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Kevin Ellis became employed as a truck driver for the respondent in May 2002. His job duties included hauling asphalt, dirt or salt in a dump truck to a certain job site, unloading it and then returning for another load. He also cleaned out the bed of the truck when needed.

On Saturday, July 15, 2006, claimant was scraping out the bed of the truck when he felt something pop in his lower back. As that load was the last of the day the claimant took the truck back to the yard. He then got in his truck and went home but by the time he got to his home he was not able to get out of his truck. The following Monday he notified respondent's owner, Mr. Phil Smith, about the injury. Mr. Smith's son, Terry Smith recommended Dr. Dopps, a chiropractor, so claimant sought treatment with Dr. Dopps that evening which continued through August 17, 2006, for a total of seven treatments and no more thereafter. Claimant did not miss any work from July 15th through November 22, 2006. Phil Smith wrote a check to Dr. Dopps for \$240 which was hand delivered by claimant to the doctor.

On Thursday, November 30, 2006, claimant was hauling salt from Hutchinson to Wellington, Kansas. He had unloaded and scraped the salt out of the bed of the truck. Claimant testified that as he was getting out of the truck bed he slipped, missed a step and fell to the ground landing on his buttocks. That was the last load of the day. Claimant worked in pain on Friday but continued to take some pain medication and rested over the weekend. The following Monday he was only able to work 3.5 hours due to the pain so he contacted Phil by telephone to advised him of the pain. Claimant further testified that on Friday he had told respondent's secretary, Carla Smith, that he had fallen and re-aggravated his back. The last day claimant worked was December 4, 2006.

Phil Smith, respondent's owner, was aware that claimant had injured his back on July 15, 2006, and he paid for claimant's medical treatment with a chiropractor. Mr. Smith testified that claimant continued working and never mentioned his back again until sometime later when claimant stated that he had injured his back moving furniture. And Mr. Smith testified that he was told by Mr. Stegall that claimant had injured his back moving furniture. Mr. Smith also noted that claimant never told him he had fallen out of a truck in November 2006.

Carla Smith, respondent's secretary, testified claimant continued working and doing a good job after his accident in July 2006. Ms. Smith testified that claimant never reported another work-related injury to her. She was not aware claimant alleged he had injured himself in November 2006 due to missing a step and falling. But on December 11, 2006, Jerry Stegall came to the office and told her and Mr. Philip Smith that claimant had hurt his back when he helped Mr. Stegall move furniture.

Both Phil and Carla Smith testified claimant never brought an off-work slip to them and that Jerry Stegall informed them that claimant had hurt himself while moving furniture.

Jerry Stegall testified that he and claimant had become friends while fishing at a lake together. Because Mr. Stegall and his wife were splitting up claimant agreed to help Mr. Stegall's wife move furniture out of the house to an apartment. Claimant moved furniture for Mr. Stegall's wife on November 24, 2006, and then again on December 1, 2006. After hauling several loads of furniture claimant told Mr. Stegall that he had hurt his back and did not carry any more that day. On December 1, 2006, claimant helped carry more furniture but later said he had again hurt his back moving the furniture and was not going back to work. Mr. Stegall stayed with claimant from December 1 through 10th until they had a falling out. Mr. Stegall advised Phil and Carla Smith on December 11, 2006, about claimant injuring his back while moving his wife's furniture.

Rhonda Lawrie testified that she is claimant's girl friend and lives with him. She testified that in late November claimant came home barely able to walk and told her after shoveling out the back of his truck he had jumped out and hurt his back. And Ms. Lawrie testified that when they had helped move the Stegall's furniture the claimant had just driven a truck and otherwise just sat in the truck. Ms. Lawrie further testified that when she evicted Mr. Stegall from her apartment that Mr. Stegall said that because claimant owed him money he was going to get even with him.

Claimant testified he was present at the time when furniture was being moved from Mr. Stegall and his wife's house but that he did not personally move any furniture.

After the preliminary hearing there were several witnesses who testified by deposition to primarily provide rebuttal evidence or to corroborate the testimony of either claimant or respondent.

Scott Smith testified on claimant's behalf that heard the claimant hollering on November 30, 2006, and went around the truck to find the claimant doubled over in pain. Mr. Smith testified claimant told him he had slipped and reinjured his back. On cross-examination Mr. Smith agreed he had quit because he did not think Mr. Phil Smith properly responded to his requests for repairs on the truck he was driving.

Marilyn Stegall testified that she became acquainted with claimant as he was a fishing companion of her husband, Jerry Stegall. And during the summer of 2006 she never saw or heard claimant complain about his back. Mrs. Stegall testified that claimant picked up and lifted items such as an entertainment center, bed chairs kitchen table, a dresser and boxes. Claimant told her he injured his back moving the furniture and she gave him some of her pain pills.

Nanett Lowery testified that Marilyn Stegall is her mother and she was present when claimant helped move her mother's furniture. She observed claimant physically lifting and carrying her mother's furniture.

Finally, when Mr. Stegall went to claimant's attorney's office for a deposition after the preliminary hearing a physical altercation between claimant and Mr. Stegall occurred in the parking lot.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

Initially, this Board Member finds claimant has met his burden of proof that he suffered a work-related back injury on July 16, 2006. He was provided treatment with a chiropractor until August 17, 2006. But after that treatment ended the claimant never requested additional treatment from respondent and did not miss any time from work while receiving the chiropractic care. Several witnesses recall that during this time claimant did not demonstrate any indication that his back continued to cause him problems. It was not until December 2006 that claimant became debilitated to the point that he could not continue working. And claimant did not allege his injury in July 2006 was the reason he could not work, instead, he alleged he suffered another injury on November 30, 2006. Based upon the evidence compiled to date it is clear claimant suffered an intervening injury to his back after the incident at work in July 2006. Consequently, the controlling issue is whether he suffered the debilitating injury at work on November 30, 2006, or whether he injured himself moving furniture.

Where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. This Board Member concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify.

The comments made by the ALJ in his May 10, 2007 Order clearly reflect that, after considering claimant's testimony and that of the other witnesses, the Judge found claimant's credibility to be suspect regarding his assertions that he never moved any furniture. The ALJ also found claimant had failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The Board's review of the record

¹ K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

² K.S.A. 2006 Supp. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

suggests it is reasonable to rely on the ALJ's determination of credibility in this case and concludes the claimant did not prove he suffered accidental injury arising out of and in the course of his employment on November 30, 2006.

Moreover, when claimant saw Dr. Dopps after the July incident at work there is mention in the doctor's record of a work-related incident but at claimant's December 4, 2006 visit with Dr. Dopps, just days after the alleged fall at work, there is no mention in the doctor's notes of a work-related injury. Likewise, a December 17, 2006 office visit claimant had with his personal physician did not mention a fall at work in November 2006. Accordingly, claimant has failed to meet his burden of proof that his worsened back condition in December 2006 was related to his work for respondent.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁴

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated May 10, 2007, is modified to reflect claimant met his burden of proof that he suffered a work-related accident on July 15, 2006, which resolved and affirmed to find claimant failed to meet his burden of proof that he suffered accidental injury on November 30, 2006.

IT IS SO ORDERED.

Dated this 31st day of July 2007.

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

³ K.S.A. 44-534a.

⁴ K.S.A. 2006 Supp. 44-555c(k).